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OFFICE OF PETITIONS

CHOATE, HALL & STEWART LLP  
TWO INTERNATIONAL PLACE  
BOSTON MA 02110

In re Patent No. 7,678,759	:	DECISION
SONTHEIMER et al.	:	DISMISSING REQUEST FOR
Issue Date: May 16, 2010	:	RECONSIDERATION OF PATENT
Application No. 10/686,782	:	TERM ADJUSTMENT
Filed: October 17, 2003	:	UNDER 37 CFR 1.705(d)
Attorney Docket No. 2006636-0064	:	

This is a decision on the renewed petition filed on Monday, February 7, 2011,<sup>1</sup> which is being treated as a petition under 37 CFR 1.705(d) requesting that the patent term adjustment indicated on the above-identified patent be corrected to indicate that the term of the above-identified patent is extended or adjusted by six hundred seventeen (617) days.

The petition to correct the patent term adjustment indicated on the above-identified patent is **DISMISSED**.

Patentee's dispute the period of time excluded from B delay for appellate review. Patentee's argument has been considered, but not found persuasive. The period consumed by appellate review, whether successful or not, is excluded from the calculation of B delay. See 35 U.S.C. 154(b)(1)(B)(ii). An appeal to the Board of Patent Appeals and Interferences commences with the filing of a notice of appeal. See 35 U.S.C. 134(a). Generally, an appeal to the Board of Patent Appeals and Interferences ends with either 1) a Board decision, 2) the examiner reopening prosecution and issuing another Office action, or 3) the applicant filing a request to withdraw the appeal and reopen

<sup>1</sup> This petition was timely filed within two months of the decision on the request for reconsideration of patent term adjustment mailed December 6, 2010.

prosecution (e.g. the filing of a request for continued examination). In this instance the period consumed by appellate review is one hundred fifty-nine (159) days, beginning on May 25, 2007, the date of filing of the notice of appeal and ending on October 30, 2007, the day before the filing of the RCE. Thus, B delay is two hundred nineteen (219) days.

It is noted that the Office issued a Notice of proposed rulemaking entitled *Revision of Patent Term Extension and Adjustment Provisions Relating to Appellate Review and Information Disclosure Statements*, 76 FR 18990 (April 6, 2011). To the extent that the final rule on *Revision of Patent Term Extension and Adjustment Provisions Relating to Appellate Review* revises the interpretation of appellate review applied in this decision, Patentees are given **one (1) month or thirty (30) days**, whichever is longer, from the date of the final rule to file a request for reconsideration. No extensions of time will be granted under § 1.136.

Nothing in this decision shall be construed as a waiver of the requirement of 35 U.S.C. 154(b)(4) that any civil action by an applicant dissatisfied with a determination made by the Director under 35 U.S.C. 154(b)(3) be filed in the United States District Court for the District of Columbia within 180 days after the grant of the patent.

Telephone inquiries specific to this matter should be directed to the undersigned at (571) 272-3211.

*C. T. Donnell*

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